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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION, Petitioners, DIVISION OF OIL, GAS AND MINING, Respondent, ALTON COAL DEVELOPMENT, LLC Intervenors,	DIVISION'S MEMORANDUM IN OPPOSTION TO PETITIONERS' MOTION *IN LIMINE* Docket No. 2009-019 Cause No. C/025/0005

The Division of Oil, Gas, and Mining (Division), by and through counsel hereby submits the following Memorandum in Oppositions to Petitioners' Motion *in Limine*.

PROCEDURAL BACKGROUND

Based on the agreement of the parties, the Board approved of a schedule for discovery in preparation for the hearing of this matter including a site inspection, and a limited opportunity for each party to dispose expert and fact witnesses. The hours allowed for depositions and time available for preparation were limited. The Division made its witnesses available to the

Petitioners and the depositions of Dana Dean, Priscilla Burton, Joe Helfrich, Daron Haddock, and Jim Smith were taken. Others witnesses including April Abate, and David Darby were offered but Petitioners declined to take their deposition. Most witnesses testified on one subject, some on multiple subjects. Witnesses were designated by the Division as persons they intended to call on the subject and the persons who could best address the questions in a particular subject matter. In crafting the Stipulation, counsel for Petitioners, inserted that the depositions would be pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. Rule 30(b)(6) provides that a subpoena for a deponent may name an organization, and that the organization shall designate one or more of its officers, directors or managing agents to testify on behalf of the agency. The person so designated is to testify to matters known or reasonably available to the organization. The rule does not otherwise distinguish the nature of the deposition or use of the testimony from other types of depositions.

The Division's witnesses provided their testimony under oath and each person attempted to truthfully answer all of the questions. Depositions were quickly arranged and the parties tried to accommodate each other's schedules. Questions involved recollection of specific facts in a complex multi-volume record of reviews and analysis. Reference to the record was allowed during the depositions, but time did not always allow for a review of the documents and occasionally witnesses couldn't respond. The answers were not as complete as the written record of the decision and occasionally a witness misspoke or remembered incorrectly. The witnesses were able to review their testimony as provided for by the Rules of Civil Procedure before signing their deposition and they made corrections and the corrections were sent to counsel. Some of the corrections were the result of errors in transcription, and some were errors in speech, and occasionally there were errors in memory or fact that were identified. These

changes were all communicated to the Petitioners. Jim Smith made a number of changes to the written transcript of his testimony including some testimony given toward the end of a long day covering a wide range of hydrologic matters. (See Exhibit 1, amendment to testimony) Specifically, Mr. Smith referenced additional geologic reports and a map that in his corrected the record he said he used to in addition to baseline data to establish parameters for material damage to the hydrologic balance. The map and study are reference twice in the CHIA (pages 23 and 28) and were referred to in a general way in Division's Response to the Request For Agency Action. The Petitioners' expert witness on the subject of preparing monitoring plans referred to the study by author several times in his deposition given a few weeks following.

ARGUMENT

1. The Board has sole discretion to determine the proper use of deposition testimony at the hearing.

This matter is an administrative hearing governed by the Procedural Rules of the Board of Oil Gas and Mining Utah Admin. Code R641-100 to 641-119. Discovery is permitted only by leave of the Board. Utah Admin. Code R641-108-900. When Petitioners sought leave to conduct discovery, the Division filed its Memorandum in which the Division presented it arguments that the Board has sole authority to permit or deny discovery and the absolute discretion to limit the scope, type and duration of discovery. (See Memo attached at Ex 2). The Board did not rule on this question, since the parties were able to stipulate to limited discovery including a limited right to take depositions. The Board is the sole guardian of the right to conduct discovery and can set its own rues on the use of that discovery in hearings before the Board.

The only authorities offered by the Petitioner for limiting the testimony of the Division are federal cases interpreting the federal rules of civil procedure in cases involving corporate

entities. Even this authority is admittedly inconsistent with other federal authority on the same question. The Board has not adopted the provisions of Rule 30(b)(6) and it should not adopt these rules to be applied to the review of decisions by the government. A government agency is governed by limitations of its statutory creation and must follow those mandates and rules. A person is not generally permitted to assert estoppel against a government entity based on the actions of an individual, even in cased of detrimental reliance. (cite Consolidation Coal v. Board) This protection from claims of estoppel are much stronger for government entities than for a corporation. The Division and the Board are bound by statutes to review the full record of this decision and can not avoid that duty because of improper actions of an individual even if those actions were intentionally misleading. The incomplete recollection of a witness in this case to a question at a deposition at the end of a long day certainly is not a basis for avoiding that duty. The provisions of Rule 30(b)(6) and the cited cases do not change that obligation. The Board should use its discretion to require full testimony from all witnesses and not bar the Division from presenting the full record and testimony of its witnesses.

2. The deposition testimony cannot replace the Division's written record and explanations.

The Petitioners, by filing the Motion *in Limine,* are seeking to freeze the Division's testimony and to prohibit any other explanation of the reasons for the decisions on the Coal Hollow Permit with regard to the specified testimony based on one statement by one person. The Division concedes that testimony given under oath at a deposition may be used as a basis to attack the creditibility of a witness's testimony at trial. However such impeachment is subject to the right of the witness to first explain the inconsistency.

It is an extraordinary position to claim that deposition testimony cannot be countered by the government entity, and then to use this imperfect statement as a substitute for the real record of the Division's decision. The use of Federal Rule 30(b)(6) of the Rules of Civil Procedure may have a place in some court settings where a corporate entity's opinion is must be established by litigation, but that is not the nature of this administrative proceeding. The Board is charged to review the basis for the Division's action to determine if the permit decision as contained in the final decision documents, findings and technical analysis is arbitrary, capricious and is supported in the information submitted by the application or otherwise.

The Petitioners' by its motion *in limine* would have the Board disregard the information submitted by the applicant, the written review and analysis in the Technical analysis, the correction made by the witness of the deposition, and instead hold that the Division's testimony is limited to the incomplete information referred to in a deposition by a designated witness! Such a ruling would turn the inquiry upside down. The purpose of this administrative hearing is not to ferret out from testimony of a designated witness what the decision of the Division is, but to examine that published and documented decision and see if it is supported by the record and is consistent with the requirements of the Coal Act and Rules. The deposition should not be used as a trick to make the decision appear to be what it is not.

3. The Division has the right to present its full record and witness testimony in support of its decision, and the Board has a duty to determine the correctness of the written decision based on the full written record and the testimony of the witnesses.

To better accomplish the goal of having a thorough review and in compliance with the provision of the Board's rules and the Coal Act's requirements, the Board has ruled in this matter (and in a similar review of coal permit decisions), that the parties have the right to present

testimony and cross examine witnesses to satisfy their due process rights. (see Board Order on Nature of the Proceedings.) The Board has ruled in this matter that it will not review just the written record of the decision, but will also hear witness testimony.

Full opportunity to provide the witnesses testimony will allow the Board to understand the findings of the Division and fulfill its role to make findings and uphold, deny or modify the decision of the Division. This purpose cannot be accomplished if it limits the evidence to the discovery testimony and precludes full testimony and examination of the record. The Board's rules provide that they should be interpreted liberally to "secure just, speedy, and economical determination of all issues." R641-100-300. The discovery and its use should be directed and limited to be consistent with those purposes. Additionally, each party is to be allowed the opportunity to introduce evidence, examine witnesses and cross-examine witnesses, make arguments (R641-101-200). The granting of the motion *in limine* would improperly limit these rights of the parties and prevent the full truth being exposed to the Board.

Both the Petitioners and the Division will have that right to cross examine witnesses and if the creditibility of the witness is damaged by the prior testimony at a deposition, the parties can demonstrate that fact to the Board. However, the purpose of the hearing is for the Board to determine that the application and the decision of the Division are consistent with the requirements of the Coal Act and regulations and was not determined arbitrarily.

4. The Petitioners have not been prejudiced by the witnesses incomplete recollection at the deposition.

The answer given to the question about the establishment of the parameters for damage to the hydrologic balance was obviously inconsistent with the actual explanation in the Division's

CHIA. The answer omitted a USGS survey map and report. However these documents were referenced twice in the CHIA. No one precluded the Petitioners from asking about the other document in the record. The inconsistent answer was one small stick in a large bundle of facts; not a single finding that was otherwise irrefutable. There was reason for Petitioners to look further into the record. The Petitioners' expert Mr. Norris, did take that step and referred to this report four different times when discussing the water parameters and background levels for the water quality. (Exhibit 3, Deposition testimony of Charles Norris) The omission was corrected by the witness, and counsel was advised within the time required by the rules for signing depositions. Finally the Petitioners are being afforded an opportunity to resume the deposition to ask follow-up questions about the corrected testimony.

CONCLUSION

The truth of the complete record is at the heart of this motion *in limine.* The Board should deny the motion, and permit the full testimony of the Division's witnesses and allow cross- examination based on the discovery. The Board cannot allow the obviously incomplete, corrected, and inconsistent answer to a question in a deposition to be used via the alleged authority of the federal rules of civil procedure to preclude the Board from making a review of the full record of the Division's decision.

Respectfully submitted this 25th day of April, 2010

Steven F. Alder, (Bar No #0033)
Fredric J. Donaldson, (Bar No #12076)
Assistant Attorney General
Counsel for Division of Oil, Gas and Mining

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing Rely to Petitioners' Motion in Limine, to be mailed by first class mail, postage prepaid, the 26 day of April, 2010 to:

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Exhibit 1

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BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, SOUTHERN UTAH WILDERNESS ALLIANCE, NATURAL RESOURCES DEFENSE COUNCIL, and NATIONAL PARKS CONSERVATION ASSOCIATION, Petitioners, DIVISION OF OIL, GAS AND MINING, Respondent, ALTON COAL DEVELOPMENT, LLC Intervenors,	**DIVISION'S MEMORANDUM IN REPLY TO PETITIONERS' MOTION FOR LEAVE TO CONDUCT DISCOVERY** Docket No. 2009-019 Cause No. C/025/0005

The Division of Oil, Gas, and Mining (Division), by and through counsel hereby submits the following Memorandum in Reply to Petitioners' Motion for Leave to Conduct Discovery.

PROCEDURAL BACKGROUND

1. The Division's decision on the Alton Coal Development, LLC (ACD) application was issued after completion of a thorough analysis of the application involving numerous exchanges of submittals, reviews and revisions over a period of three years and four months; from the date of the initial submittal on June 27, 2006 until approval on October 19, 2009. Thousands of pages

of documents have been exchanged in order to arrive at the final application; thousands of conversations have been documented including consultations with staff, ACD's consultants and other agencies before the Division reached the final review and approval of the modified permit application and the final decision with findings.

2. The result of this process has been to assemble an application that addresses each of the requirements of the Coal Act and its regulations. The beginning submissions and the intervening submissions and decisions have been supplanted by subsequent submissions and are not part of the final approved application. The earlier versions and analysis is no longer meaningful except as a history of the application review process. This history includes some instances of error and revisions on behalf of both ACD and the Division based on mistakes or misunderstandings, but the history also shows how the application was improved until it was determined to satisfy the regulatory requirements.

4. The Division has maintained a full and complete public record of the documents generated as part of this application review process in the Public Information Center (PIC) at the Division's offices in Salt Lake City, Utah. The information contained in the PIC files is open to public inspection and copying and is also available on line. A CD containing electronic copies of all of all of the information contained in these public files has been provided to counsel for the Petitioners and ACD.

5. These files include all of the documents that have been generated during the three years and four months that were a significant part of the Division's review and decisions on this application including all pertinent correspondence and documents related to the application, all information and reports submitted in support of the application, all of the Divisions' reviews and

responses to the correspondence and documents submitted, and all subsequent revisions, reviews and responses by the ACD and the Division.

6. These public records contain all reports of visits to the proposed area, records of all meetings with the applicant, its consultants, and other state and federal agencies and all correspondence with those consultants and agencies. The files also include the minutes of meetings, summaries of Division's evaluations, pictures of the proposed locations taken by the Division, and records or internal reports of the Division generated as part of its investigations and reports.

7. The Division's public record files also include copies of all relevant email correspondence and transmittals except for non-significant exchanges of greetings, confirmations, scheduling of meetings and similar non-significant exchanges as determined by the Division's employees in conformance with its policies.

ARGUMENT

1. THE BOARD HAS ABSOLUTE AUTHORITY TO GRANT OR DENY A RIGHT TO CONDUCT DISCOVERY, AND TO SET THE EXTENT AND MANNER OF DISCOVERY IF IT DETERMINES THERE IS GOOD CAUSE.

The Utah Administrative Procedures Act under its designation of procedures for formal adjudicative proceedings states: "(1) [I]n formal adjudicative proceedings, the agency may by rule, prescribe means of discovery adequate to permit the parties to obtain all relevant information necessary to support their claim or defenses. If the agency does not enact rules under this section, the parties may conduct discovery according to the Utah Rules of Civil Procedure." Utah Code §63G-4-205 (2010)

In accordance with this general provision for all state agencies, the Board has enacted rules that prescribe the means of discovery for matters to be heard before it though its rules at Utah Admin. Code R641-108-900. This Board rule: (1) requires the motion of a party; (2) requires a showing of good cause; and (3) provides that the Board *may authorize such manner of discovery* against another party (including the Division) as may be prescribed by the Utah Rules of Civil Procedure (URCP).

The language "may authorize such manner" as used in this rule is not surplus but grants the Board authority to set limits on the extent and manner of discovery. The right of an agency to set limits on the rights to use of discovery in a formal adjudication includding the right to deny discovery was upheld in *Beaver County v. Utah State Tax Commission*, 916 P.2d 344, 352-353, (Utah 1996); and *Petro-Hunt,LLC v. Department of Workforce Services*, 197 P. 3d 107(Utah 2008). In *Beaver County*, the court clearly stated the law that " discovery in administrative proceedings is available only if governing statutes or agency rules so provide" (at page 352, citations omitted). The court upheld the Public Service Commission's order denying discovery based on its policy that only allowed discovery of information presented to the commission and denied discovery that sought additional information from the opposing party in the case.

In *Petro-Hunt*, the Court upheld the agency's denial of discovery based on an agency rule that limited the right to discovery in order to avoid delay and minimize costs. The rule allowed discovery only if informal discovery was inadequate, there was not other available alternative that would be less costly or intimidating, it was not unduly burdensome, it was necessary to properly prepare and it would not cause unreasonable delay.

This Board's authority to limit the manner and extent of discovery has been recognized and applied by it in formal adjudications similar to this matter. Most recently, in Lila II, (SUWA

v. Division, Docket 2007-015, Cause C/007/013-LE07) the Board's order permitting discovery (Attached as Exhibit 1) expressly provided that it did "not authorize discovery methods to the fullest, most extensive degree they might be used in civil litigation in state courts, but [the board] will place some limitations on their use pursuant to its ability to regulate discovery under R641-108-900 and Utah Rules of Civil Procedure 26(b)(1) and 26(b) (2)." (Exhibit 1, p. 10, citations omitted.) Although the Board's Order in Lila II refers the discretion afforded trial courts to oversee discovery pursuant to Rule 26(b) of the URCP, the Board's discretion is not bound by the Rule 26(b) language or case-law. There is no question under the authority of *Beaver* and *Petro-hunt,* supra, that the Board may **deny** discovery in its administrative hearings based on its view of good cause. Accordingly, it must be conceded that the Board's authority to **limit** the extent and manner of discovery is very broad and is greater than that of a court in a judicial context under rule 26(b) URCP where there is a right to discovery in accordance with the URCP. The URCP and decided case may be instructive to the Board in determining when to allow discovery, but the Board is not bound or limited by the URCP or the case law as it determines if and what manner of discovery is necessary in a given administrative hearing.

2. THE BOARD HAS DEVELOPED CRITERIA FOR DETERMINING IF THERE IS GOOD CAUSE FOR DISCOVERY AND FOR DETERMINING THE EXTENT AND MANNER OF DISCOVERY IT WILL ALLOW.

In Lila II, the Board looked at a number of factors that pertain to a board review of a permit decision and that may affect the amount of discovery permitted. Specifically, the Board identified as important considerations: (a) the opportunity for public participation and the public nature of the record and process, (b) the administrative nature of the hearing, (c) the time within

which the matter is to be adjudicated, (d) the limitations of the parties' resources (including those of the Division with limited staff), and (e) the overall needs of the case. (See Order, page 9). In this matter there is an exhaustive public record that is fully available and contains all of the information that is being challenged. As with all matters before the Board, this is not a judicial appeal but intended as forum for a just, speedy and economical determination of these technical issues. in order to accomplish these purposes as with the agency in Petro-Hunt, there is justification to avoid re-examining the entire permit process. There is a presumption of validity and the burden in on the Petitioners to show error in the final decision. This does not mean they should be able to review through discovery the entire three-year process. At the least the Board should make reasonable time and other limits that result in a self-imposed efficiency on the use of discovery.

Any discovery allowed by such an order should be limited in a manner that will assure that the parties do not abuse the right to conduct discovery. All discovery is of course limited to matters relevant to the subject matter of the adjudication; and should not be unreasonably cumulative or duplicative or unduly burdensome. See Utah Rules of Civil Procedure 26(b) and *Ellis v. Gilbert*, 429 P.2d 39, 40 (Utah 1967) and *Bennion v. Board of Oil, Gas and Mining*, 675 P.2d 1135, 114 (Utah 1972).

Requests for production of documents beyond those provided by the Division's public record and identification of persons to be deposed and questions at depositions should be limited to documents and questions that pertain to the claims that are supportable by the law and facts as raised in the pleadings. For example, the request for information about a meeting with the Governor (where it is admitted the status of the permit review was discussed in September 2009) is not relevant and is improper area for discovery unless there is a demonstration that the

information provided in the application or the Division's findings were altered or changed improperly after such a meeting. A 'fishing expedition' into such highly controversial allegations based solely on suspicion and innuendo is too broad and would have no limits since such allegations of improper influence could be made for all witnesses based on any manner of alleged influence. First, there must be a basis in the record to support inquiries that are otherwise based only on outrageous allegations of improper conduct. If such baseless allegations or inquiries were to be the boundary for discovery, then all of the communications of all employees and consultants would be subject to inspections and deposition to see if there was any undue influence on their decisions.

The Board's order should also limit the discovery requests regarding alleged deficiencies to cases where the allegations, if true, would support a claim. When there is no basis in law for the Petitioners' claims, even if true, there is no basis for permitting the delay and expense imposed by the burden of complying with discovery. For example, prior to allowing discovery regarding damages allegedly caused by the impact of the mining on visibility of the night sky there is a burden to demonstrate that such impacts are within the regulatory authority of the Coal Act. Similarly, assuming the Division's motion to dismiss is granted there is no reason to allow discovery concerning the effects of coal truck traffic on hydrology and cultural resources in the City of Panguitch.

The Division identifies these three examples of improper discovery contained in Petitioners' discovery requests in order to illustrate that discovery must be reasonably related to claims that are at least potentially viable based on the law and facts as alleged. The Division believes it is premature to file formal objections to specific requests until the Board rules on the Petitioners' Motion for Leave to Conduct Discovery and established limits on the extent and

manner of discovery, if any it will allow. The Division reserves the right to object to the specific requests for documents and designations of persons to be deposed after the Board has ruled.

3. THE BOARD SHOULD FASHION A DISCOVERY ORDER BASED ON MANDATORY INITIAL DISCLOSURES AND A LIMITED RIGHT TO MAKE SUPPLEMENTAL REQUESTS FOR DOCUMENTS AND TAKE DEPOSITIONS OF WITNESSES

The Board, in Lila II acknowledged that there had been an initial disclosure of a "record" and provided that the Division may refer to the record in response to request for documents. The Board also established a schedule for the initial disclosure of witnesses (with summaries of testimony), an exchange of final witness lists, a statement of qualifications and reports, if any, of experts and summary of testimony for experts, and a deadline for completion of discovery. The Order also limited the number of hours allowed for depositions. This scheduling and disclosure order provided for the disclosures needed for the hearing without compromising the goals of efficiency, timeliness and economy that an administrative hearing is designed to allow.

CONCLUSION

The Board should establish a similar order in this case requiring each party to make initial disclosures of the documents and witnesses they will rely on to present their case and to make a defense, and a timely disclosure of expert witnesses and reports, if any. After compliance with such an order, the Board might then provide an opportunity for supplemental requests for production of documents, and a limited amount of time for depositions of witnesses. Such additional requests and depositions will allow the parties to preview testimony and prepare

for the hearing and will provide for the most efficient use of time allotted for testimony before the Board.

Respectfully submitted this ___ day of January, 2010

Steven F. Alder, (Bar No #0033)
Fredric J. Donaldson, (Bar No #12076)
Assistant Attorney General
Counsel for Division of Oil, Gas and Mining

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing REPLY TO MOTION FOR LEAVE TO CONDUCT DISCOVERY, to be sent by electronic transmission and to be mailed by first class mail, postage prepaid, the _____ day of January, 2010 to:

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_____

Exhibit 2

Q & A REPORTING, INC.

April 7, 2010

In Re: **Utah Chapter of the Sierra Club v. Division of Oil, Gas & Mining**
Docket No.: 2009
Cause No.: c/025/0005
30(b) (6) Deposition of Utah Division of Oil, Gas & Mining-James Douglas Smith
Date of Deposition: February 22 & March 1, 2010

--oOo--

Please be advised that the **SIGNED WITNESS CERTIFICATE** of the above-referenced deposition has been returned to our office. The Original sealed transcript with the original signed certificates will be delivered to the counsel listed below for safekeeping until trial or other disposition of the case once all witness certificates have been received or the 30-day reading period has expired.

Steve Bloch
Southern Utah Wilderness Alliance
425 East 100 South
Salt Lake City, Utah 84111

☐ No corrections were indicated (see attached witness certificate)

☒ Corrections were indicated (see attached witness certificate)

cc: Sharon Buccino
Walton Morris
Denise Dragoo
Steve Alder

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Case: Utah Chapter of the Sierra Club versus
Division of Oil, Gas and Mining
Docket No.: 2009-019 Cause No. C/025/0005
Reporter: Tamera Stephens, Q&A Reporting, Inc.
1872 South Main, Salt Lake City, Utah 84115

WITNESS CERTIFICATE

State of Utah)
ss.
County of Salt Lake)

I, JAMES DOUGLAS SMITH, HEREBY DECLARE: That I am the witness referred to in the foregoing testimony; that I have read the transcript and know the contents thereof; that with these corrections I have noted this transcript truly and accurately reflects my testimony.

PAGE-LINE		CHANGE/CORRECTION	REASON
95	25	Replace "line" with "lying"	clarify
96	12-13	"deposit on uplift" → Paunsaugant Uplift	clarify
111	13	There is no depth of certainty, but the	
___	___	probability decreases as depth below	clarify
___	___	the coal increases	
114	23	Replace "shady" with "shaley"	clarify
141	19-20	"Water Rights" capitalized	reference to the Division of Water Rights
143	18	Replace "based on" with "base line"	clarify
145	17-18	"Water Canyon" capitalized	proper noun - specific canyon
___		~~No corrections were made~~.	

Continued on back

JAMES DOUGLAS SMITH

SUBSCRIBED and SWORN to at Salt Lake City, Utah, this 23 day of March, 2010.

Notary Public

TERI J. AKIYAMA
NOTARY PUBLIC - STATE OF UTAH
My Comm. Exp. 10/01/2010
Commission # 580285

Page	Line	Change / Correction	Reason
172	15	Years for this training were 1993 & 1994	Clarify
188	1	The one water quality sample at SW-4 is the only sample prior to permit approval; any data collected before construction begins will also be pre-mining data	Clarify
196	2	Replace "non episodic" with "episodic"	I don't know if misspoke or the r misunderstood, bu "episodic" is wha intended.
203	17	"Tech-006" is as it reads in the MRP, but this should be "Tech-004"; this is a typo or error in the MRP; however, Tech-003 and Tech-006 do contain some information pertinent to this issue.	Clarify

Exhibit 3

COPY

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

UTAH CHAPTER OF THE SIERRA CLUB, et al.,	
Petitioners,	
vs.	Docket No. 2009-019
DIVISION OF OIL, GAS AND MINING,	Cause No. C/025/0005
Respondent,	
and	
ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH,	
Intervenors-Respondents.	

DEPOSITION OF CHARLES NORRIS

MARCH 23, 2010
9:19 A.M. TO 2:23 P.M.

Location: Division of Oil, Gas and Mining
1597 W. North Temple, Suite 300
Salt Lake City, Utah

Reporter: Tamera L. Stephens, RPR, CRR
Notary Public in and for the State of Utah

of work given to me.

I have seen Mr. Petersen's declaration that he filed as part of some of the exchanges that had the water quality data tables in it. But that would be about it.

Well, then some of the discovery, Mr. Petersen's field notes, laboratory analyses, those things are actually most of what's on the thumb drive I gave you.

Q. Have you consulted any treatises or prior studies or reports by other professionals?

A. No. Beyond material -- well, I pulled the -- one of the documents that the CHIA relied on, the Price -- USGS Price map. I got that to look at that.

Q. Just to be clear, have you had any prior professional acquaintance or prior professional work in the Alton Coal field area?

A. Other than the stratographic sections that I measured back in 1969 that was unrelated to any coal process, no.

Q. Have you contacted any other individuals to obtain their opinions about the hydrology of the Alton Coal field area?

A. No.

MR. ALDER: I think I would like to take a break, if that would be all right.

(Break was taken from 10:42 a.m. to 11:01 a.m.)

the -- for those types of waters that's given in the CHIA is, I believe, 1,200 milligrams per liter. Most of the water most of the time on that site is within that.

If you were to take the average water or mean of water coming off the site, based on the data that's been collected, it's below 1,200. There's just no rationale that I can come up with, and certainly none that's offered, for using persistent concentrations above 3,000.

I mean, there's references to the Price map that the USGS did, which shows, except for a single data from a single monitoring point up above Alton on the creek, there's nothing anywhere around there that is not in the blue-type pattern.

There is not an abundance of TDS 3,000 analyses in either surface or groundwater at the site, in spite of language to that effect, that has been included. Surface water may have one point that exceeded 3,000 on one occasion, and there is one anomalous groundwater well that is consistently above 3,000. That's it.

Everything else there is pretty decent water. And most times of the year, and particularly if you look at the volume adjusted concentration, is below the 1,200. So a 3,000 is bizarre to me and inappropriate.

Q. Is it inappropriate for post-mining or interim mining or is there any purpose for which that high

issue related to the 3,000.

The water level is not that contaminated. It would take it way above where it is now. Colorado River Basin has no degradation on salts being delivered to Mexico. All of those things enter into a reason that that 3,000 can't -- but should it be 1,199 or should it be 700? I don't know and I'm not going to render an opinion on that.

Q. And how do you -- what would you -- or what steps do you think the division should go through or should have gone through to set that material damage criteria?

A. I think they should have looked at the water quality. I'm not sure where they got the opinion that over 3,000 was abundant in that area and that basically that would just be -- would be looking at the ambient water quality. It certainly could not have come from that opinion based on the data collected in the baseline period. It's not a reasonable inference from the 30-year-old Price document.

I think the approach to start, as far as the TDS standard, criterion for that permit would be to look at the water quality that's there, try and get a better sampling of the water quality than what has been developed so far, figure out the existing water quality at the edges of the permit and where the tributaries feed into Kanab Creek, and then given that number, find the value that is obviously

discussing the basis for your opinion that --

A. Oh, maybe. I was referring to the Price map that is cited, and I was saying that this whole area, with the exception of a little stretch of Kanab Creek, is all within the blue area of the map indicating minimum TDS.

Q. Okay. Great.

A. I think that --

Q. That must have been it. And that's a reference to the Price map; is that correct?

A. Yes. Right.

Q. It wasn't the blue plate special or anything like that?

A. No.

Q. Okay. Very good.

MS. DRAGOO: All right. That's all the questions I have. Thank you.

Do you have any follow-up?

MR. ALDER: No.

EXAMINATION

BY MR. MORRIS:

Q. I have one question just to clarify the record and to be sure everything is before you all.

Mr. Norris, in this list of litigation on behalf of citizens -- well, with respect to that and with that in mind, did there ever come a time when you represented or did